**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

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| **UNITED STATES OF AMERICA,** | ) | |
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| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Cause # 1:13-CR-0150-WTL-TAB** |
| | ) | |
| **SHUYU LI,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF**
**DEFENDANT LI'S MOTION FOR REVOCATION OF DETENTION ORDER**

Now comes the Defendant, Shuyu Li, by counsel, Scott C. Newman, and pursuant to Title 18, United States Code, § 3145(b), respectfully submits his MEMORANDUM OF LAW IN SUPPORT OF that certain pleading titled DEFENDANT LI's MOTION FOR REVOCATION OF DETENTION ORDER previously filed on October 15, 2013, in the above-captioned cause, in accordance with the briefing schedule established by Order of this Court.

The District Court's *de novo* review of the tape and/or transcript of the pretrial detention hearing held on October 8, 2013 before U.S. Magistrate Judge Mark J. Dinsmore will amply demonstrate that this Defendant, Shuyu Li, Ph.D. ("Dr. Li") poses neither a risk of flight, nor a risk of danger to the community, nor indeed of danger to any individual member of the corporate or business community as has been alleged by the government in this case.

Moreover, the *de novo* review will convince this Court that the government has fallen far short in its burden to prove that no combination of conditions can be imposed that will reasonably assure the safety of the community and the appearance of Dr. Li as will be required of him at future court proceedings. Magistrate Judge Dinsmore's provisional factual findings and conclusions of law[1] are not persuasive to the contrary, and indeed constitute error, though a showing that the ruling below is "clearly erroneous," or even simply erroneous, is not the standard required in order for this Court to properly render a contrary set of findings upon this record, as the review here will be *de novo*.

The detention hearing was conducted by means of live, largely summary witness testimony and informal but specific proffers of fact by the respective attorneys, about which no genuine dispute existed between the parties. The pretrial detention hearing of Dr. Li's codefendant, Guoqing Cao, was conducted simultaneously with that of Dr. Li, though the parties and the Magistrate endeavored to make separate presentations and findings as pertained to each defendant.

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[1] After a 45-minute recess following the evidentiary hearing on pretrial detention, Magistrate Judge Dinsmore returned to the bench and, beginning with the observation that "this was a very difficult decision," *see Transcript of Proceedings,* U.S. v. Li (Oct. 8, 2013) ("PTD Hearing Transcript"), at 83, set forth his findings verbally. These findings are set forth and analyzed more fully, *infra*, in the body of this Memorandum. A copy of the official transcript of the pretrial detention hearing held in this matter on October 8 is attached hereto as Appendix A, and made a part hereof. Three (3) days later, on October 11, 2013, Magistrate Judge Dinsmore issued his findings of fact and conclusions of law in written form ("Written Findngs"). These are reproduced as Appendix B, also attached hereto and made a part hereof.

The facts established or, in essence, proffered and mutually undisputed by the parties at the October 8 hearing on pretrial detention included the following:

1. Dr. Shuyu "Dan" Li ("Dr. Li") stands charged under a Superseding Indictment issued on August 14, 2013, with violations of Title 18, United States Code, sections 1832(a)(2) and 2 [Theft of Trade Secrets and Conspiracy].

2. Specifically, Dr. Li is charged with having transmitted via e-mail, on company computers and/or via the company's computer networks, scientific information alleged to constitute protected "trade secrets" owned by Eli Lilly & Co. ("Lilly"), one of the world's ten largest pharmaceutical companies, headquartered in Indianapolis.

3. The co-defendant in this case is a former Lilly employee by the name of Guoqing Cao, who is now employed by a Chinese company that manufactures medicines. Cao is charged with having initiated and been the recipient of these disclosures of proprietary information, which benefited his employer, Jiangsu Hengrui Medicine Co., Ltd. ("Hengrui"), a Chinese domiciliary with its principal offices in Shanghai.

4. Nowhere in the Superseding Indictment is it alleged, nor has the government in its proffered testimony cited any evidence, that Dr. Li (1) profited by or received anything of value in return for the alleged disclosures; (2) that he exported or conspired to export any inherently prohibited, sensitive or classified technological components; or (3) that he committed or conspired to commit any acts of Economic Espionage, in that none of the information at

issue was transmitted with the intent that it be sold to or shared with any foreign government. *See* 18 U.S.C. § 1831. Rather, the government's allegations and proffered evidence in this case amount to nothing more nor less than a series of allegations that Dr. Li's company e-mail was wrongfully used to aid incidents of thievery perpetrated to the detriment of a local private-sector company, for the presumed benefit of another private company, a foreign company seen as a competitor at least for the developing Chinese market.

5. Thus, the criminal offenses charged in the indictment in this case are *not* among those entitling the government to a presumption in favor of detention pursuant to 18 U.S.C. §§ 3142(e)(2), 3142(e)(3), or 3142(f)(1).[2]

6. Without the benefit of a statutory presumption in its favor, and upon this record and this background, the government shouldered at this hearing a substantial burden—and rightly so—to tip the evidentiary scales to the side of "dangerousness," bad character and substantial risk of flight against a person who is, to all appearances, a devoted, responsible American citizen and family man. Such an approach must grapple with the pretrial release statute's *general* presumption in *favor* of pretrial release, resorting only to appropriate conditions for that release, when necessary. The record in this

[2] These statutory provisions provide rebuttable presumptions in favor of detention until trial for certain crimes of violence, state or federal, *see* 18 U,S,C, 3142(e)(2)(A); certain violations of the Controlled Substances Act or the Controlled Substances Import and Export Act, 21 U.S.C. § 801 *et seq.,* 21 U.S. C. 951 *et seq.*; an offense for which the maximum sentence is life imprisonment; violent crimes involving firearms, and offenses involving a minor victim, *see, e.g.,* 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2244(A)(1), 2245, 2251, 2252, 2260. 2421, 2422, 2423, or 2425.

case revealed itself at the hearing to the following effect, the component facts of which are undisputed:

7. Dr. Li was born in China on September 25, 1968; he is 45 years old. His parents were electrical engineers.

8. Dr. Li has absolutely no criminal history, has never failed to appear for a court proceeding, does not abuse drugs or alcohol, and has no history of substance abuse or distribution, firearms violations, or violence of any kind.

9. Dr. Li and his wife, who have been married for more than twenty (20) years this past July 30, are both citizens of the United States of America, having been naturalized in the year 2009. According to the immigration and nationality laws of both China and the United States, one is not allowed to possess "dual citizenship" in the two countries. Therefore, both Dr. Li and his wife, Angela, upon swearing their oaths as American citizens, renounced their Chinese citizenship and severed all legal ties with that country. They would not be permitted, among other things, to obtain a Chinese passport.[3]

10. Dr. Li and his wife, Angela, are the parents of two young girls, both born in the United States, both U.S. citizens by birth. The girls

[3] Special Agent Matthew Malinowski testified as the summary witness for the government, though he had not been assigned the case as "case agent." On direct, he advised that as an FBI Special Agent, he could not control the ways in which foreign countries, like China, issue travel documents to their citizens, who then could vacate the United States more easily. On cross-examination, however, he testified that he did not know whether Dr. Li had renounced his Chinese citizenship. Agreeing that China, like other countries, only issues passports to its citizens, he found that he could not, therefore, answer whether the risk he had presented on his direct testimony was at all applicable to Dr. Li's circumstances. *See* Hearing Transcript, at 36.

attend public school, in kindergarten and in 4th grade, within the Hamilton Southeastern School District. The girls speak American English as their first and primary language, and it is the primary language used in the family home. Never in Dr. Li's daughters' lifetimes has either of them been physically separated from their father even for as long a period of time as his detention thus far by federal authorities.

11. Dr. Li has remained incarcerated in the general population at the Henderson County Detention Center, in Henderson, Kentucky, since his arrest on October 1.

12. Dr. Li, his wife and two children all possess valid U.S. Passports. They offered at the pretrial detention hearing to surrender all four passports as a condition of Dr. Li's release, and through undersigned counsel, they tendered them to the Court on the spot.

13. At the time of his indictment, Dr. Li was (and remains) a long-time resident of Carmel, Hamilton County, Indiana, having moved there after accepting a job offer from Lilly in 2002. Before that, he resided in San Francisco, California, where he was employed by Tularik, Inc., an American cancer and cardiovascular research firm acquired by Amgen in 2004. Before that, he resided in Dallas, Texas.

14. Dr. Li holds a Bachelor of Science degree in Cellular Biology from Zhejiang University, Hangzhou, China; a Masters degree in Cellular Biology from the Chinese Academy of Science, Shanghai, China; and a Ph.D. in Molecular Biology from the University of Texas ("UT"), UT-Southwestern

Medical Center, Dallas. Dr. Li did his post-doctoral work at the University of Texas, Southwest Medical Center, in Dallas.

15. Until shortly before his arrest in this case, Dr. Li had been employed by Lilly for more than eleven years, primarily as Research Advisor in a section of the Lilly organization providing bio-informatics data mining and analysis in support of laboratory bench work in Oncology. Dr. Li had been repeatedly promoted, and had attained to the highest technical proficiency level within his entire group.

16. Dr. Li was asked by Lilly to resign in May, 2013, while the present investigation was ongoing and shortly before his arrest on October 1, 2013. He remained unemployed at the time of his arrest, but had been actively seeking employment, and had just received two concrete and substantial offers of employment from a well-established pharma company within the United States, and from a prestigious teaching hospital and medical research institute, also in the United States.

17. Dr. Li's wife, Angela, remains a long-time resident of Carmel, Hamilton County, Indiana, where she continues to reside with the couple's young daughters in the house the couple shared before his arrest.

18. Dr. Li's wife is also a long-time employee of Lilly, where she is a Senior Research Scientist in the Cancer Developmental Pathways group, focusing primarily on developing biological targets of interest for further research into potential cancer cures. Her disciplinary and quality assurance records, as far as we are aware, are unblemished.

19. Dr. Li has been a long-time property owner in Hamilton County, Indiana. His current family home, in Carmel, is a leasehold only because Lilly provided assistance and incentives to Dr. Li's family in selling his residence, in conjunction with their offering him a transfer opportunity for what was projected to be a three-year prospect at a Lilly-owned facility in Shanghai, China.

20. Dr. Li has been a regular participant in his central Indiana community of residence. For example, he was designated a member of the de Tocqueville Society, an honorific organization recognizing those Lilly associates who have contributed with extraordinary generosity, relative to their pay-grades, to the United Way of Central Indiana, a well established charitable umbrella organization.

21. A detention hearing before Magistrate Judge Mark J. Dinsmore was scheduled for October 8, 2013. In anticipation of that hearing, U.S. Probation for the Southern District of Indiana prepared a "PS-3" pretrial release investigative report. That report, of which the Court can take judicial notice, classified Dr. Li as a Level I, lowest-risk category for flight, and recommended that he be released pending trial, with appropriate conditions as outlined therein.

22. In addition to the conditions recommended in the PS-3, Dr. Li offered to surrender not only his own U.S. Passport, but to tender those of his wife and two daughters as well.

23. The PS-3 further confirmed that Dr. Li has never been arrested nor charged with any crime, nor failed to appear for any court obligation, summons or warrant to appear.

24. A detention hearing was conducted on October 8, 2012, Magistrate Judge Mark A. Dinsmore, Presiding. At the hearing, the government called an FBI Special Agent to summarize a governmental proffer of facts pertinent to Dr. Li's dangerousness and risk of flight. Specifically, the government contended that no condition or combination of conditions could reasonably assure either the safety of any other person and/or the community, or the appearance of Dr. Li as required. The government further argued that Dr. Li presented a continuing, substantial risk of irretrievable economic harm to Lilly, and a substantial risk of flight.

25. In his ruling issued orally on October 8, followed in written form by findings and conclusions issued on October 11, Magistrate Judge Dinsmore ruled that the government had *failed to meet its burden* of showing, by clear and convincing evidence, that no set of conditions could reasonably assure the safety of any person, specifically, Lilly, or risk of serious economic harm to Lilly, or the economic safety or well-being of the community as a whole.

26. Magistrate Judge Dinsmore also found, however, that the government *had* met its burden of proof by a standard of *preponderance of the evidence,* that Dr. Li presented a substantial risk of flight, and that no condition or set of conditions could reasonably assure his appearance as required.

## Relevant Law & Discussion

This Court is by now well familiar with the usual litany of how one approaches a pretrial detention analysis. There are the "presumptive" predicates for detention (violence, child victims, bad history, guns and drugs, mostly), and there are the rest of the categories that force the government to "go it alone," without the benefit of a statutory presumption, carrying its burden of proof all by itself like a cross to Golgotha.

From there, it is customary for all brief writers since the Bail Reform Act dunked its first Salerno, in the person of organized crime figure "Fat Tony" Salerno, *see* United States v. Salerno, 481 U.S. 739 (1987), to note which category one claims to be, and what is the burden of proof that attaches to it. In a move to warm a litigator's heart (if such a thing exists), the drafters of this fascinating statute took the trouble to embrace two separate standards of proof—"preponderance" and "clear and convincing." And the debates and circuit-splits continue to erupt today over which standard applies: does the "clear and convincing" standard apply as broadly as we once thought? *See, e.g.,* United States v. Parahams, 2013 WL 683494 (N.D. Indiana 2013).

Then come the "G" factors, and their application to the facts of the case, 18 U.S.C. § 3142(g), with each "factor" being declared for one or the other litigant, as rounds are declared for this or that prize-fighter. The factors are sensible and by now, familiar: "The nature and circumstances of the offense charged," "the weight of the evidence," "the history and characteristics of the person," their "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history of drug or alcohol abuse, criminal history and record concerning appearance at court proceedings." 18 U.S.C. §§ 3142(g)(1), (2), (3).

A fair reading of this record leads to the almost ineluctable conclusion that the government, working in this case (as all are agreed) without the benefit of any statutory presumption in favor of detention, barely moved the needle on any of these factors, let alone carried the burden of proof by a preponderance of evidence.

But before we belabor that, which we must, why not ask the fundamental question that the statutory matrix is really designed to get at: Just what is an appropriate case for holding someone without bond for months pending trial? Where is the proper tipping point? The "shock of the new" Bail Reform Act, as it reverberated through the federal system in 1986, was so stunning that even veteran prosecutors could be heard to say, "No bond, in a non-murder case? Come on!." Today, the statute is familiar—perhaps *too* familiar. The pretrial detention statute of today hovers around the kitchen door on almost a daily basis, always ready to ask 'what's for supper?' —as if it needed to be fed regularly, as a matter of routine.

The statute that stayed to dinner has been transformed during recent years, despite the imprecations and warnings issued when the first cases upholding the statute were announced and published. In Salerno itself, we are reassured by the Supreme Court to the following effect:

> "Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act *carefully limits the circumstances* under which detention may be sought to *the most serious of crimes*. See 18 U.S.C. 3142(f) (detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders)."

Salerno, supra, 481 U.S. at 747 (emphasis supplied). *See also* United States v. Dominguez, 783 F.2d 702, 705 (7th Cir. 1986)("…[P]retrial detention should be neither sought nor ordered absent careful consideration); ("The statute is not just a backup to the Constitution. It prescribes a criterion for continued detention—that there be *no adequate alternative that is less restrictive*—which must be satisfied regardless of constitutional requirements"). *Id* at 707 (emphasis supplied).

One can hardly dispute that the allegations that have been placed against Dr. Li will have enormous repercussions for him, if proven at trial. In this sense, the charges are "serious" enough and not to be minimized. But at the core of this prosecution there lies an accusation of purely private pilferage between competing drug companies. And the statute deployed is one that pins culpability on the perpetrator making off (a) with a decidedly elusive form of intellectual property known as a "trade secret," and (b) with the specific intent to "injure" the party whose trade secret is pirated away, or brought to ruin.

There is much more here than meets the eye. A trade secret for criminal law purposes is simply not the same as at civil law. The definition of a "trade secret" contained in this criminal statute, even according to Judge Posner, is even more "abstruse" ad "elaborate" than its complex cousin at civil law. *See* United States v. Jin, No. 12-3013 (Slip. Op.)(7th Cir. Sept. 26, 2013). It is simply not whatever Lilly says that it is, or whatever Lilly decides to claim protection for. In the world of the scientist, a failed experiment causing toxicity is an opportunity for all in the scientific community to learn, and do no more harm. In the present Superseding Indictment, however, a failed experiment from the year 2004 is denominated "Trade Secret No. 3." And just as a trade secret is not whatever its owner claims it is, neither is every e-mail that goes where it ought not go, from one scientist to another, by that very fact a "theft of trade secrets" committed with the requisite "intent to injure."

Yet here precisely are the twin pillars of the Magistrate Judge's ruling in favor of detention: First, the very nature of the allegations lodged against Dr. Li carries with them a presumption of bad character, and a lack of veracity. The second linchpin finding of the ruling below is to this effect: Despite impressive strides toward the American Way and the pursuit of happiness, the fact remains that Dr. Li is originally from a country without an extradition treaty with America. He has traveled there fairly regularly for business, family, and maybe even pleasure over the course of the past decade. He must be well acquainted with many people there who could help him with fake passports and conviviality, even as (a lifelong fugitive) he loses all contact with his cherished grade-school-aged children, perhaps for life. Despite a mountain of indicators and evidence of rootedness and stability and reliability and place, family, and real investment, the Magistrate found "even more compelling" that there must be (though unspecified, in the case of Defendant Li) extended family and contacts in "the People's Republic of China."

In other words, despite renouncing his Chinese citizenship, moving his entire nuclear family, educating his beloved little girls in American public schools (no doubt subjecting himself to the daily barrage of "Radio Disney"), buying property, giving thousands of dollars to the United Way of Central Indiana, obtaining an American Ph.D. degree, and staying out of trouble with the law, all the while devoting his entire professional life over three decades to trying to help develop cures for cancer, while attentively supporting his family— despite those facts, the "ties to family and community" and "character of the accused" weighed in favor of *detention* (according to the decision that this Court will review *de novo*.)

In support of its surprising finding, the Court did take a close look at the government's proffered compilation of international travel itineraries (compiled by U.S. Customs in the ordinary course) undertaken by Dr. Li over the course of the last decade. It would appear, the court theorizes, that the gentleman has Chinese relatives and travels to … The "People's Republic of China" once or twice a year, on average. In some way, this is deemed suspect or excessive, but certainly not by the standards of an "international city" in the 21st century. Indeed, one would be hard pressed to know, by the standard set forth under the Magistrate Judge's conclusion as to "Family Ties," what any Chinese-born individual could conceivably do to be considered for release.

The Magistrate Judge's treatment of this demonstrative exhibit of 16 or so international travel trips made by Dr. Li over the course of an entire decade, is particularly telling. The list of trips fills a page and a third (with two lines per trip, one departing and one returning), and it encompasses a *decade's* worth of business and family travel. Legitimate, credible explanations subject to corroboration were provided, though certainly in the interest of time, not line by line. Lilly transferred him and his family to Shanghai in 2012; he attended regular meetings of the Asian Cancer Research Association, held in Hong Kong; family vacations were taken, and no doubt two little girls were exhibited for distant relatives and experience something of where they came from. And yet the ruling notes that, "While some of the travel in question was related to the defendants' employment by the victim company, *there is before the Court no evidence for the additional overseas travel.*" Order of Detention (Oct. 11, 2013), at 7 (emphasis supplied). With all respect, Defendant Li adequately explained the number of trips, both family vacations and business and professional travel, and the Judge's language here as elsewhere clearly shifted the burden to Defendant Li, whose burden it was not.

A similar approach appears to undergird the Magistrate Judge's approach to the accused's "character." *See* Order of Detention (Oct. 11, 2013), at 6. A key factual finding, for Magistrate Judge Dinsmore, appeared to be that "after years of personal investment" by Lilly in Dr. Li, and despite significant precautions undertaken by the company, "Defendant[] [is] alleged to have violated the company's trust," *regardless* of whether the matters divulged could be considered trade secrets. "The allegations, *by their very nature* and more specifically, based on the extraordinary and long-term commitment demonstrated by the company to [Dr. Li], reflect negatively" on the "character of the accused" and his "veracity" (emphasis supplied). *See Detention Order, supra, at 6.*

Once again, it would be difficult to conceive of what a Chinese-born defendant facing an accusation of a crime of moral turpitude or dishonesty could do to counteract reasoning that in effect creates an improper presumption in favor of detention, contrary to the statute.

In sum, based on (1) the asserted likelihood of conviction from the mere fact of the government's unsupported and conclusory claim that it possesses evidence of the charged trade-secret theft in the form of e-mail messages; (2) the inference of suspect character and a lack of veracity based on the same evidence claimed to support the probable cause finding in this same pending case; and (3) the Magistrate Judge's omission to examine and analyze the existence of other conditions or less restrictive alternatives to pretrial detention, as required by law, Defendant requests this Court to find the correct result, and to release him pending his trial.

Finally, it is not simply harkening back to observe that our detention statutes-- in the absence of an explicit statutory exception creating a presumption in favor of detention—are entirely built around a presumption in favor of *release* pending trial. In applying that presumption of release and seeking the least restrictive alternative, the standard does not require ironclad guarantees, only the "reasonable assurance" that the defendant will make all appearances as required. The proposed release with conditions as outlined herein will amply provide such assurance; no more is necessary.

WHEREFORE, this Court, in *de novo* review, should make a prompt, independent determination concerning Dr. Li's release, *see United States v. Portes*, 786 F.2d 758, 761 (7th Cir. 1985); 18 U.S.C. § 3145(b). And upon such a prompt review, Dr. Li respectfully submits that this Court should ORDER his immediate release pending the trial of this cause, upon appropriate conditions such as home detention with electronic monitoring, a pledge of a sum of money as security for his appearance from among the assets set forth in the PS-3, regular reporting to probation, and surrender of his and his family's Passports, as may be required by this Court and by U.S. Probation's pre-trial services, and for all other relief just and proper in the premises.

**Respectfully submitted,**
**/S/ *Scott C. Newman***

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## CERTIFICATE OF SERVICE

I hereby verify that a copy of the foregoing DEFENDANT LI'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REVOCATION OF DETENTION ORDER, was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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SCOTT C. NEWMAN, Counsel for Shuyu Li DATE